IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 263.

JOSE J. BENITEZ DIAZ, in his own right and as father with PATRIA POTESTAS over his minor unemancipated children CARLOTA, JOSEFA and JOSE BENITEZ SAMPAYO and DIEGO GARCIA ORTEGA,

Petitioners,

vs.

CARLOTA AND CLEMENTINA GONZALEZ Y LUGO, represented by their guardian *ad litem*, ARTURO APONTE, JR., and MANUEL GONZALEZ Y LUGO,

Respondents.

BRIEF FOR RESPONDENTS

JOSE A. POVENTUD,
FREDERICK S. TYLER,
FRANK ANTONSANTI,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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LIST OF CASES CITED AND REFERRED TO.

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BRIEF FOR RESPONDENTS.

Statement of the Case.

The respondents herein, Carlota and Clementina Gonzalez y Lugo, by their guardian *ad litem*, Arturo Aponte, Jr., and Manuel Gonzalez y Lugo, plaintiffs below, brought this action in

the District Court for the Judicial District of Ponce, Porto Rico, against Jose J. Benitez Diaz, in his own right and in representation of his minor children, to recover certain interests claimed by them in real estate situated within the Judicial District of Humacao, Porto Rico, together with the rents and profits thereof, on the ground that the sale of these interests by the mother, as their guardian, to the petitioner by virtue of a deed dated the 5th day of June, 1908, under authority granted by the District Court for the Judicial District of San Juan on the 27the day of May, 1908, was null and void for the reason that the District Court for the Judicial District of San Juan did not have jurisdiction to decree the sale, alleging that the only Court having jurisdiction to authorize such sale was the District Court for the Judicial District of Humacao, Porto Rico, in whose jurisdiction the property sold was situated.

The said District Court for the Judicial District of Ponce, Porto Rico, declared that the decree of the District Court for the Judicial District of San Juan, granting authority to sell the property, as hereinbefore stated, in so far as it referred to the interests of the three plaintiffs in the said property, who were minors, was null, void and of no effect whatsoever, on the ground that the Court for the Judicial District of San Juan had no jurisdiction to enter its decree.

The petitioners herein, the defendants below, appealed from the said judgment of the District Court for the Judicial District of Ponce, Porto

Rico, to the Supreme Court of Porto Rico, which last-mentioned Court, by a vote of four to one, reversed the judgment of the said District Court for the Judicial District of Ponce, and directed that the complaint be dismissed, the Supreme Court of Porto Rico holding, in substance, that the parties to the *ex parte* application having submitted themselves that Court acquired jurisdiction.

Thereafter the respondents herein, plaintiffs below, appealed from the decision of the Supreme Court of Porto Rico to the United States Circuit Court of Appeals for the First Circuit, assigning, as error, the following, to wit:

> "The Supreme Court of Porto Rico erred in holding that the District Court of San Juan was empowered and had jurisdiction to authorize Clementina Lugo Calzada, as the mother of her minor children, plaintiffs herein, to sell the real property herein involved and which is situated within the Judicial District of Humacao, and likewise in holding that said sale so made was valid and in full force and effect, notwithstanding that such authorization was given by a Court which was not a Court within the territorial district in which the said property herein involved was situated."

The case came on regularly before the United States Circuit Court of Appeals for the First Circuit and was fully argued by respective counsel and briefs were filed upon the questions of law, which both parties considered material, and on November 1, 1921, the said Circuit Court of Appeals rendered its opinion, to the effect

that the only Court of competent jurisdiction to authorize the sale of property belonging to minors was the Court for the Judicial District in which the property was situated and that the parties to *ex parte* proceedings in such cases could not submit themselves to the jurisdiction of the Court of any other District.

Under the above concise statement of the case, it is our contention that the decision of the United States Circuit Court of Appeals for the First Circuit was well founded, as the same faithfully interprets the law of Porto Rico on the subject.

However, defendants below, who are petitioners here, sought and obtained a writ of certiorari from this honorable Supreme Court of the United States, to review the said decision of the Circuit Court of Appeals for the First Circuit, and said petitioners erroneously contend that the Circuit Court of Appeals, in reversing the judgment of the Supreme Court of Porto Rico, erred:

1. In failing to apply the rule established by repeated decisions in this honorable court that a contract made on the faith of judicial interpretations of a statute cannot be impaired by a subsequent reversal of its decision.

2. In failing to apply the rule also established by repeated decisions of this honorable court that a local rule of property established and followed by the Supreme Court of Porto Rico, should not be reversed except upon a clear showing that it was erred.

3. In holding that the order of the District Court of San Juan authorizing the sale of the property of the respondents was null and void for lack of jurisdiction.

The case is now in this highest court of the Nation, therefore, for review on its merits.

That petitioners' foregoing contentions are groundless, since more painstaking, learned, just and elaborate decisions as those rendered by the Honorable Circuit Court of Appeals for the First Circuit, reversing the Porto Rico Supreme Court in this and two other similar cases, could not be found, will be demonstrated by the following statements, considerations and

Argument.

CONCURRING HOLDINGS BY THE PONCE DISTRICT COURT AND BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, WHICH SUFFICIENTLY ANSWER PETITIONERS' ASSIGNMENT OF SUPPOSED ERRORS HEREIN.

The Court of original jurisdiction in the present case, namely: The Ponce District Court, among other matters, adjudged and held:

". . . Passing now to questions of law, to be decided in this case, we anticipate the following conclusions whose grounds we shall successively set forth: First. The authorization granted by the District Court of San Juan, Section 1, on May 20, 1908, and the deed of purchase and sale of June 5,

1908, in so far as they relate to the joint interests of the three minor plaintiffs in the described properties, are null, inexistent, ineffectual and of no legal effect or value . . . The nullity of the authorization is absolutely clear in view of the foregoing sections of the Civil Code, and it has been so held and established by the Supreme Court of the United States and of Porto Rico, among other cases, in the following:

Martorell v. *Ochoa*, 23 P. R. R. 28;
Ex parte Le Hardy, 17 P. R. R. 985;
Esteras v. *Arroyo*, 16 P. R. R. 689;
Nazario v. *The Registrar*, 16 P. R. R. 635;
Garzot v. *Rubio*, 209 U. S. 303;
Oliver v. *Oliver*, 23 P. R. R. 168;
Early v. *Doe*, 57 U. S. 617-618;
Longpre v. *Diaz*, 237 U. S. 512, 59 L. Ed. 1080;
Del Rosario v. *Rucabado*, 23 P. R. R. 438.

". . . It should not be forgotten that on March 14, 1907, the Legislature of Porto Rico amended section 229 of the Revised Civil Code, the amendment consisting mainly in designating, as the jurisdictional Court for granting authorization for the alienation or encumbrance of real estate belonging to minors, the District Court of the Judicial District WHEREIN THE PROPERTY IS SITUATED . . . (Rec. pgs. 21, 23, 26)."

The Supreme Court of Porto Rico reversed the Ponce District Court, by a vote of four to one, on the ground that any District Court in the Island was competent to grant authorization for

the alienation of minors' realty, provided that application was made to it, since such proceedings were, in their nature, *ex parte* (Rec. p153).

The Circuit Court of Appeals for the First Circuit, in turn, reversed the decision of the Porto Rico Supreme Court, remanded the case for further proceedings not inconsistent with its opinion, as amplified and explained by the opinion in *Ajenjo et al* v. *Ajenjo et al*, (276 Fed. Rep. 105), rendered the same day, and held:

> ". . . Whatever may have been the law and practice under the Spanish Civil Code, it is evident that, when the Legislative Assembly of Porto Rico enacted section 229 of the Civil Code, it intended to confine the authorization for the sale of real estate of minors to the District Court for the District in which the property is situated. We are confirmed in this view by the fact that the Legislative Assembly, in 1907, made an amendment which in clear and unambiguous language makes certain that this was its intent . . . We think it clear that the Legislative Assembly of Porto Rico, when it adopted the present Civil Code and the Code of Civil Procedure, intended to remove from the operation of sections 76 and 77 of the latter, applications for authorization to sell the real estate of minors. The amendment of section 229, made in 1907, designating the District Court of the District in which the land is situated as the Court to make the authorization instead of the place of the domicile of the minors, evinces a purpose to have the important matter of the alienation of a minor's property passed upon by a Court which would possess, or could easily obtain, knowledge of its value. It might authorize a sale at public auction, and, if

this be done, the sale is to be had in the presence of and under the direction of the Marshall of the District after 'publication of the corresponding edicts in the customary places and in a newspaper having a circulation in the District'. Judicial Proceedings, title 5, sec. 82. The only reasonable interpretation to be placed upon sections 80, 81 and 82 of this title is that all the proceedings are to be had in the District where the land is situated. Section 229 was again amended in 1911 (Laws 1911, p. 118), and made to extend to the alienation or incumbrance of personal property above the value of $500, and making the authorization of the District Court wherein the property is situate necessary. The Legislative Assembly conferred upon the parent power to alienate the property of a minor under Partia Potestas, after obtaining authorization in a certain manner, which cannot be departed from . . . It was within the undoubted power of the Legislative Assembly of Porto Rico to adopt or reject any of the provisions of the Spanish Civil Code in force at the time the American Civil Code was adopted in 1902; and if, in the exercise of a wise public policy, it provided in clear and unambiguous language that judicial authorization for the sale of lands of minors could only be given by the Court of the District in which the land is situated and where knowledge of its value could be most easily obtained and the interests of the minor most safely guarded, this cannot be overridden by judicial interpretation. We think not only that the language is clear, but, also, looking at the history of the act and the amendments made to it, that it clearly expresses the legislative intent . . . "

Lugo et al v. *Benitez et al*, 276 Fed. Rep. 108;
Ajenjo et al. v. *Ajenjo, et al.*, 276 Fed. Rep. 105, 106, 107, 108.

". . . Manresa and Scaevola, distinguished commentators upon Spanish law, are cited, and also judgments of the Supreme Court of Spain of July 22 and September 30, 1857, October 6, 1866, and June 2, 1877 . . . . Decisions of the General Directorate of Registries of Spain, are cited to the effect that the question of jurisdiction does not arise in *ex parte* proceedings because conferred by the mere act of applying to the Court. It is stated by counsel, however, and not denied, that section 1208 of the Spanish Law of Civil Procedure was omitted in the revision which went into effect in Spain in 1881, and does not appear in the Law of Civil Procedure which was made applicable to Porto Rico in 1886 . . . We think, in the discussion of this case, the Supreme Court of Porto Rico failed to give due consideration to the important fact that minors, in every civilized country and under every known form of jurisprudence, are a special care of the State; that their interests are carefully guarded by the Courts, and that neither father nor mother, without some authorization from the sovereign power itself, has any authority to sell or incumber the property of a minor child. . . . The Civil Code in Porto Rico in 1902 pointed out the manner in which this authorization could be obtained, and it is elementary that this method must be strictly complied with, for the State itself, as a protector of the rights of the minor, is interested, and under the provisions of the Spanish Code the Fiscal,

> the attorney of the State, was required to be present at the hearing upon the application and to protect the interests of the minor . . . the Court to which application is to be made for authorization to alienate the property of a minor cannot be chosen, for, if the parent, in the exercise of Patria Potestas, could choose a Court to which application could be made for such authorization, it was entirely unnecessary to provide, as subsection 23 does, that, in the authorization for the sale of property of minors or incapacitated persons, 'the competent judge shall be that of the place where the property may be situated, or that of the domicile of the person to whom it belongs'. The only reasonable interpretation that can be placed upon this section is that authorization for the sale of property of minors was not intended to be included in the cases to which submission would apply, under articles 56 and 58 . . . ."
>
> *Martorell et al* v. *Ochoa et al*, 276 Fed. Rep. 99, 101, 103, 104. (Similar case decided by the Circuit Court of Appeals, First Circuit.)

Statement regarding certain utterance attributed by petitioners to Justice Hutchinson, of the P. R. Supreme Court.

Replying to the argument of the petitioners herein, to the effect that it was stated in the opinion of Judge Hutchinson, one of the Associate Justices of the Supreme Court of Porto Rico, that hundred and perhaps thousands of

recorded titles of real property in Porto Rico will be invalidated if the judgment of the United States Circuit Court of Appeals herein is allowed to stand unchallenged, we desire to state that only two other cases have arisen in Porto Rico involving similar questions, as in the instant case, to wit:

Martorell v. *Ochoa*, 26 P. R. R., 625,
Ajenjo v. *Rosa*, 26 P. R. R., 648.

In the above cases the identical question was involved as in the instant case and decided in the same manner, as above stated, by the United States Circuit Court of Appeals for the First Circuit and which cases have also been brought before this Court upon writs of certiorari.

Assuming for the sake of argument that the rule in Porto Rico, as laid down by the Supreme Court of that island, prior to the decision of the Supreme Court of the United States in the case of *Garzot* v. *Rubio*, 309 U. S., 303 (which we do not admit), was to the effect that parties could submit to any Court in *ex parte* matters similar to the one at bar, the fact remains that, since the rendering of the opinion in the *Garzot* v. *Rubio* case, some fourteen years ago, the two cases cited above and the instant cause are absolutely the only cases involving the question that has been presented, and it certainly would be reasonable to assume that if there had been any further analogous cases they would have been submitted to the Courts ere this, especially so since the year 1915, when the Supreme Court of Porto Rico decided unequivocally that the

sale of property belonging to minors was null and void unless the Court authorizing the sale was one of competent jurisdiction, and, therefore, we fail to find any logic in the statement cited by petitioners as having been made by Judge Hutchinson.

Besides, the P. R. Supreme Court, in *Martorell* v. *Ochoa*, 23 P. R. R. 28, said:

> "In the examination which we have made we have not found a *single case* in which the same question now submitted to us has been raised and decided."

ONLY THE DISTRICT COURT FOR THE JUDICIAL DISTRICT WHEREIN THE PROPERTY INVOLVED IS SITUATED, HAS JURISDICTION TO AUTHORIZE THE SALE OF MINORS' REAL ESTATE IN PORTO RICO.

History, Legislation and Precedents.

A.

Only 3 cases in Porto Rico involving similar questions.

Three cases have arisen in Porto Rico involving a similar question, namely:

> *Martorell* v. *Ochoa*, 26 P. R. R. 625;
> *Ajenjo* v. *Rosa*, 26 P. R. R. 648;
> *Gonzalez* v. *Benitez*, 27 P. R. R. 364

the last being the case at bar.

The above three cases were appealed to the honorable Circuit Court of Appeals, First Circuit, and all of them are now here on certiorari. These are absolutely the only cases that have presented themselves during the fourteen years that have elapsed since the Supreme Court of the United States on April 6, 1908, decided the case of *Garzot* v. *Rubio*, 209 U. S. 303, 52 Law Ed. 209. Had there been any further analogous cases they undoubtedly would have been submitted to the courts, more especially so since in 1915, in disposing initially of the case of *Martorell* v. *Ochoa*, (23 P. R. R. 28) the Supreme Court of Porto Rico decided in a firm, unambiguous and emphatic manner that the sale of property belonging to minors is null unless the court authorizing the sale is the court of competent jurisdiction.

The case at bar, like *Martorell* v. *Ochoa* and *Ajenjo* v. *Rosa*, *supra*, is a case involving the sale of minors' property without the authorization of the competent court.

This question, since it affects minors in whose welfare the State is concerned, is of great weight inasmuch as it embraces a question of public policy. Minors have always been the object of special contemplation and the State as well as the courts have never ceased to watch over their interests. If this were otherwise society would not rest on a solid foundation and nations would fail to accomplish their mission of civilization in the world.

In the case now pending before this Honorable Court, the minors, respondents, herein,

were the owners of an interest in certain real property situated in the District of Humacao, Island of Porto Rico. The judge of the court of the said district, who under the law was the only judge empowered to authorize the sale of said real estate, was not even consulted. On the contrary, the mother and guardian of the minors applied to a remote court, that of San Juan, for an order authorizing the sale, which order was granted. This occurred in May, 1908, that is, after the decision in the case of *Garzot* v. *Rubio*, *supra*. In 1913 a complaint was filed in the district court praying for the annulment of the said sale.

B.

The laws of Civil Procedure not applicable to ex parte matters.

What was the jurisprudence controlling the matter when this action was brought? What law, what statute was applicable? What sources of investigation were open for the purpose of arriving at a definite conclusion?

At the time of the sale of the real property of the minors in this case, namely, in the year 1908, the revised Civil Code was in force and effect in Porto Rico, section 229 thereof being amended in 1907, (Acts and Resolutions of 1907, p. 285.)

From the time of Spanish sovereignty up to the present, two civil codes have been in force in Porto Rico. The first went into effect on Jan-

uary 1, 1890 by virtue of Royal Decree of July 31, 1889, and was operative until June 30, 1902. The second became effective on July 1 of the same year, 1902, and is still in force and effect. When the first Code was in effect in Porto Rico the Spanish Law of Civil Procedure of January 1, 1886, established by virtue of Royal Decree of September 25 of the previous year, governed. (*Martorell* v. *Ochoa*, 23 P. R. R. 28).

The said Spanish Law of Civil Procedure of 1886, contains the following three sections, to wit:

> "Art. 56.—Any judge impliedly or expressly agreed upon by the litigants shall be competent to take cognizance of the suits arising from actions of all kinds.
>
> "This submission, however, can only be made to a judge exercising ordinary jurisdiction and who is competent to take cognizance of questions similar to and of the same kind as the one submitted.
>
> "Art. 58.—An implied submission is made:
>
> "First. By the plaintiff, by the act of filing his complaint before the judge.
>
> "Second. By the defendant when after his appearance is entered in the action, he takes any further steps therein, except to formally object to the jurisdiction of the judge by declinature.
>
> "Art. 63.—In order to determine competency, in cases other than those mentioned in the foregoing articles, the following rules shall apply:
>
> . . . . . .

> "23.—In authorizations for the sale of property of minors or incapacitated persons, the competent judge shall be that of the place where the property may be situated, or that of the domicile of the persons to whom it belongs."

When the Spanish Civil Code went into effect in the year 1890, section 164 thereof read as follows:

> "SECTION 164.—The father, or the mother in the proper case, cannot alienate the real property of the child, the usufruct or administration of which belongs to them, nor encumber the same, except for sufficient reasons of utility or necessity and after authorization from the Judge of the domicile, hearing the Department of Public Prosecution, except the provisions, which, with regard to the effects of transfers, the Mortgage Law establishes."

Until June 30, 1904, the Spanish Law of Civil Procedure was in force in Porto Rico.

On July 1, 1904, the new Code of Civil Procedure took effect, which is still in force and is almost literally the same as the Codes of Civil Procedure of California, Idaho, and certain other States of the American Union, as can be observed by a simple comparison between the various codes, except that jury trials were not made a part of the regular civil procedure in Porto Rico.

The Supreme Court of Porto Rico, however, states that Sections 76 and 77 of this Code are of Spanish origin, being equivalent to Sections 56 and 58 of the Spanish Law of Civil Pro-

cedure, just above set out. A comparison of these sections is the best answer to the statement.

On the other hand, Sections 76 and 77 of the Porto Rican 1904 Code of Civil Procedure read as follows:

> "SECTION 76. In accordance with its jurisdiction, a court shall have cognizance of the suits to which the maintenance of all kinds of actions may give rise, when the *parties* may have agreed to submit the suit to decision of court.
>
> "SECTION 77. The submissions shall be understood to be made:
>
> 1. By the written *agreement* of the *parties.*
>
> 2. By the *plaintiff* through the mere act of applying to the court and filing the *complaint.*
>
> 3. By the *defendant* when, after his appearance in court, he takes any step other than to request that the trial be held in the proper court."

And by reason of the similarity which the Supreme Court of Porto Rico has found between these sections, it stated (Transcript of Record, p. 153):

> "And the old construction which the Supreme Court of Spain established in its judgments of July 22nd and September 30th, 1876 and June 2, 1877 is that in matters of *ex parte* jurisdiction the question of territorial jurisdiction is not considered because the law confers this upon the court in which the petition is filed."

In this connection we may observe that the Supreme Court of Porto Rico fell into a most serious error.

In the first place, the Spanish Law of Civil Procedure took effect on January 1, 1886, and the judgments of the Supreme Court of Spain above quoted are of the years 1876 and 1877, that is to say, of a period ten years prior to said date, when the Spanish Civil Procedure Law of 1855 was still in force, which in Section 1208 expressly permitted any judge to take cognizance of *ex parte* matters. That law, however, was repealed in Spain in 1881, and in the new law which superseded it, Section 1208 was omitted, for which reason the provisions of said section had no further effect.

In the second place, the Supreme Court of Spain since the enactment of the procedure law of 1881 has never decided that any court has jurisdiction in *ex parte* matters. This is elementary, and we challenge anyone to produce a single Spanish authority upholding such a contention. Moreover, in cases of the sale of the property of minors, it has never been decided in Spain, either before 1881 or after that time, that any court may authorize the same.

Had there been any decision of that kind petitioners or the P. R. Supreme Court would certainly not have lost the opportunity to quote the same.

Further, we may refer to Article 71 of the Spanish Code of Civil Procedure in force in Porto Rico until 1904, which clearly shows that the provisions of law in special cases must be carefully complied with:

> "ARTICLE 71: The rules established in the foregoing Articles shall be understood without prejudice to the provisions of law in special cases."

But let us give all advantages to petitioners for the sake of argument and suppose that even very lately, in the present year, the Supreme Court of Spain had decided that in *ex parte* matters any court has jurisdiction. Can it be said that such a theory could be applied in Porto Rico under the Porto Rican laws?

The theory of the submission of parties is clearly set forth in Sections 76 and 77 of the Code of Civil Procedure of Porto Rico, enacted in 1904, which sections have been above set out.

Is it not clear that in Porto Rico the theory of submission is not applicable in *ex parte* matters? Is it not evident that in these sections of the law reference is made only to "suits" in which "the parties" have "agreed to submit the suit" to a particular court? It is also to be noted that Section 77 determines how the submission is to be made, viz:

1. By the *written agreement* of the *parties.*
2. By the *plaintiff* through the mere act of applying to the court and filing the *complaint.*
3. By the *defendant* when, after his appearance in court, he takes any step other than to request that the trial be held in the proper court.

These rules clearly show that the Sections refer to "suits" and not to *ex parte* matters relating to the sale of property of minors in which there are no "plaintiffs" nor "defendants" nor can there be any "written agreement of the parties".

But even supposing that these sections refer also to *ex parte* matters (a situation which it is impossible to suppose, except for the sake of this argument), even conceding this, could these sections prevail against the clear letter and spirit of Section 229 of the Civil Code which, as amended, became effective in 1907, three years later than the Code of Civil Procedure? What was the intention of the lawmaker when he emphatically provided that the *authorization for the sale of the property of minors "shall be accorded by the District Court of the Judicial District where said property is situated?"*

In the year 1907 Section 776 and 777 of the Code of Civil Procedure were in force, just as they are today. And in that same year Section 229 of the Civil Code was amended to determine *which court shall authorize the sale of minors' real property.*

Therefore, even granting that the theory of submission prevailed at that time in *ex parte* matters, such theory remained without force or effect from and after the promulgation of Section 229 of the Civil Code of 1902, as amended in 1907, since this section conferred *exclusive* jurisdiction upon the Court of the Judicial Distrist where the property of the minor is situated. Nothing could be clearer and sounder.

Besides, Sections 76 and 77 of the Code of Civil Procedure providing for the submission of parties do not obtain in *ex parte* proceedings, inasmuch as they refer to "*actions*" or "*suits*" and not to "*ex parte proceedings.*"

An *ex parte proceeding* has been defined by Black as

> "A proceeding at the instance and for the benefit of one party only and without notice to or contestation by any person adversely interested."
>
> See 18 Cyc. 1500.
>
> An action contemplates "the act of three parties, the plaintiff, the defendant and the court."
>
> *Wynn* v. *Tallapoose County Bank*, 53 So. 228, 237.

The above cited sections relate to "actions" between one or several "plaintiffs" and one or several "defendants", and consequently reference is made therein to "plaintiffs" and "defendants", which are terms unknown in an *ex parte* proceeding.

C.

Theory of submission inapplicable when there is special law on subject.

It is not our purpose to discuss at this time whether section 164 of Civil Code of 1890 was repugnant to subdivision 23 of article 63 of the Law of Civil Porcedure in force in 1890. Ar-

ticle 71 of the said Law of Civil Procedure made express reservation in regard to special laws. This is shown by the following:

> "ART. 71.—The rules established in the foregoing Articles shall be understood without prejudice to the PROVISIONS OF LAW IN SPECIAL CASES."

And inasmuch as section 164 of the Civil Code of 1890 contains a special substantive provision, as is that relating to the matter of the sale of property belonging to minors, there is no doubt that the Civil Code should prevail.

What we will say, however, is that whether viewed from the standpoint of the Spanish Law of Civil Procedure of 1886 (Art. 63, subdivision 23), or from the standpoint of section 164 of the Spanish 1890 Civil Code, it cannot be denied that a question exists and that the same is absolute and conclusive, namely, that if the theory of submission were allowed to prevail, the provision set out in subdivision 23 of article 63 of the Spanish Law of Civil Procedure immediately following the articles referring to such submission, reading thus:

> "In authorizations for the sale of property of minors or incapacitated persons, the competent judge shall be that of the place where the PROPERTY MAY BE SITUATED, or that of the domicile of the persons to whom it belongs"

would be superfluous. If our contention is not sound, subdivision 23 would serve no purpose and result in an absurdity. And even on the hypoth-

esis that the Spanish Legislature intended to establish an absurdity in the said law at the time of its enactment (which we cannot admit), from the moment section 164 of the Civil Code designated the court charged with the duty of judicially authorizing the sale of minors' property, such provision confers an *exclusive jurisdiction thereon*. If this construction is faulty, the inclusion of such a precept in one of the articles of the said Civil Code would be idle and superfluous, for if the scope of the Law of Civil Procedure went so far in the matter of submission, what was the purpose of section 164 of the Civil Code? What was the object of specifying so emphatically the court having jurisdiction to make the order authorizing the sale?

But now, let us suppose for a moment the absurdity that the 1904 Code of Civil Procedure of Porto Rico expressly authorized submission in cases like the present.

In such event we would have something more tangible than a mere conjecture. But even so, this provision could not prevail against the clear mandate of Section 229 of the Civil Code.

The Code of Civil Procedure became effective in 1904, and the Civil Code, in so far as it refers to Section 229, as amended, became effective in 1907. We would thus have a general law relating to *ex parte* matters, and a special law referring to a concrete case: the sale of the property of minors, and specifying what court must grant permission for the same. The former provision would be of the year 1904 and the

latter of the year 1907. Would it be possible to accept a submission in such a case?

> "Hence, where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special act *must be taken as* intended to constitute an *exception* to the general act as the Legislature is not presumed to have intended a conflict" (Black on Interpretation of Laws, 2d Ed., pp. 328-329).

It is thus evident that even though the Code of Civil Procedure should generally permit submission in all matters, both *ex parte* and *contested* (which it does not), yet from the moment the Civil Code *specially* and *particularly* designates the court which shall authorize the sale of properties of minors, the latter provision must prevail, as it is the special law relating to the matter.

The American Code of Civil Procedure became effective in 1904. Section 229 of the Civil Code, as amended, became effective in 1907. The former refers to "submission" in contested matters and makes no mention of *ex parte* matters. Section 229 of the Civil Code relates to the sale of the property of minors, which is an *ex parte* matter, and in the following language specifies the court which is to grant the authorization:

> "Which *shall be accorded* by the District Court of the judicial district *where said property is situated*".

In *ex parte* proceedings, the statute must be strictly observed.

> *Early* v. *Doe*, 57 U. S., 617-618, 16 How. (U. S.) 610.

Thus, there is no alternative but to conclude that the legislator intended to give *exclusive jurisdiction* to the court of the place where the minor's real property is situated. If it were otherwise, the clear and mandatory provision of Section 229 of the Civil Code, as amended in 1907, would be superfluous.

Inasmuch as jurisdiction has been defined for these matters by Section 229 of the Civil Code of Porto Rico, as amended in 1907, it is unquestionable that that jurisdiction cannot be shifted or moved at a party's will.

> "JURISDICTION AS AFFECTED BY *SITUS* OF PROPERTY OR DOMICILE OF WARD.—In some states jurisdiction for a sale of minor's land on application of his guardian is in the court of the county in which the land is situated, although the guardian may have been irregularly appointed. In other states the court of the county in which the guardian received his appointment has jurisdiction to order sales of wards' real estate whether situated in that county or in another. If a probate court appoints a guardian for an infant whose domicile and property are situated in another county, and orders a sale thereof, the sale is void for want of jurisdiction in the court to make the appointment and order of sale" (21 *Cyc.* 121).

It is inconceivable how it could be possible to sustain the theory that a guardian may dispose of a minor's real estate by resorting to any court that he may please, where the law specifically provides and requires that he should resort to the court where the property is situated, this being the court vested with power to authorize the alienation of said real estate. To hold otherwise is to permit that a minor's estate could run the imminent risk of being unduly lost, as it happened in this case. The law cannot tolerate such an outrage.

D.

Section 229 of the Civil Code, as amended in 1907, enacted to protect minors.

The foregoing were the laws in force in Porto Rico during Spanish sovereignty and on the basis thereof not a single judgment was handed down either by the Supreme Court of Spain or by the former Supreme Court of Porto Rico (Audiencia Territorial) holding that the theory of submission could be applied in the matter of the authorization of the sale of property belonging to minors. There is absolutely no jurisprudence to uphold the theory of the petitioners.

In the year 1898 Spanish sovereignty ceased in Porto Rico and in the year 1902 a new civil code was enacted, section 229 of which reads:

> "The father and the mother cannot alienate any real property belonging to their children, the usufruct of which they receive

or for which they have the administration, nor can they burden the same except by mutual consent, and after securing the authorization of the *district court of their domicile*.

This article was amended in 1907 as follows:

"The exercise of the PATRIA POTESTAS does not authoribe the father or mother to alienate or burden real property which in any manner belongs to the child and over which either of them have the administration, except after securing judicial authorization WHICH SHALL BE ACCORDED BY THE DISTRICT COURT OF THE JUDICIAL DISTRICT WHERE SAID PROPERTY IS SITUATED upon proof being furnished as to the necessity or utility of such transfer or burden." (Acts and Resolutions of 1907, p. 285.)

Finally, in the year 1911, said section was again amended as follows:

SECTION 229.—The exercise of the 'patria potestas' does not authorize the father nor the mother to alienate or lay any encumbrances upon real property of any class whatever, or upon personal property, the value of which exceeds five hundred dollars, pertaining to the child and which may be under the administration of the parents, without the previous authorization of the district court wherein the property is situate and the demonstration of the necessity and utility of the alienation or encumbrance and in conformity with the provisions of sections 80, 81 and 82 of an act relative to special legal proceedings." (Acts and Resolutions of 1911, p. 118.)

It will be noted that each successive amendment to this section of the Civil Code imposes greater limitations upon the power of the guardian in regard to the property of minors, in whose benefit such amendments were undoubtedly made.. This shows that the legislator has been vigilant and zealous in contemplating the property of minors, limiting more and more the powers of the guardian and unequivocally designating the Court that is empowered to authorize the sale. If this is true, how can it be contended that this designation of a court by the said Civil Code is or has become inoperative? Thus far as regards the Civil Code of Porto Rico.

E.

Court of competent jurisdiction only that designated in Civil Code.

Now, on July 1, 1904, there went into effect in Porto Rico the new Code of Civil Procedure, repealing the former Law of Civil Procedure in force under the Spanish regime from January 1, 1886. Finally, one year later, that is, on March 9, 1905, there was enacted a statute entitled "AN ACT RELATING TO SPECIAL LEGAL PROCEEDINGS," section 80 of which provides as follows:

> "In all cases where, according to the provisions of the Civil Code, the parents or the tutors of a minor shall be in need of judicial authorization to do anything referring to the keeping of the said minor or of his prop-

> erty, a petition shall be filed with the district court of *'competent'* jurisdiction setting forth under oath the necessity of the object sought, the advantage ensuing therefrom to the minor and the reasons for the request." (Italics ours.)

The law also requires that minors' realty shall be sold at public auction in the presence of and under the direction of the Marshal of the District after "publication of the corresponding edicts in the customary places and in a newspaper having a circulation in the District."

> Sec. 1621 of Compilation of the Rev. Statutes and Codes of P. R., p. 314.

This also irresistibly shows that all proceedings for the sale of minors' lands are to be had in the district where the land is situated.

The last section of the said Special Legal Proceedings Act reads thus:

> "SECTION 85.—This act shall take effect from and after its passage, and all previous laws in conflict herewith are hereby repealed; but the special proceedings established in the Civil Code, in the mortgage law and its regulations, and in any other law, in so far as not provided for by this act, remain in force."

Upon and in view of the enforcement of this act, all commentaries regarding the effectiveness of section 229 of the Civil Code, as amended in 1907, which governs the proceedings and designates the court having jurisdiction of the sale of the property of minors, are superfluous. If the

Special Legal Proceedings Act expressly allowed the Civil Code to remain in full force and effect, and if said Act by section 80, which we have transcribed herein, provides that the petition for leave of the court MUST BE PRESENTED IN THE DISTRICT COURT OF COMPETENT JURISDICTION, there can be no doubt that such district court of "*competent jurisdiction*" shall be that designated by section 229 of the Civil Code, namely, that where the property of the minors is located, since if all district courts were of '*competent*' jurisdiction in the matter, the Special Legal Proceeding Act would not have employed the following words "A PETITION SHALL BE FILED WITH THE DISTRICT COURT OF 'COMPETENT JURISDICTION," inasmuch as all the district courts of Porto Rico are of equal jurisdiction.

> "We are of the opinion that the language 'by a Probate Court of competent jurisdiction' signifies the probate court whose jurisdiction it is proper to invoke in the particular case in hand.—Sec. 6, C. 38, p. 415 Pub. Stats., provides that the application for license to sell *must* be made to the probate court of the County in which the guardian was appointed." (*Montem v. Purdy*, 11 Minn. 384.)

In the case of *Spellman* v. *Dowse*, 79 Ill. 66, the Supreme Court of that State said:

> "The requirement of the statute that an application by a guardian to sell the real estate of his ward shall be made in the county where the ward resides, or, in case the ward does not reside in the state, in

> some county where the whole or a part of the real estate is situated, IS JURISDICTIONAL; and any material deviation from these requirements, as to the court in which the proceedings must be had, is FATAL TO THE JURISDICTION OF THE COURT."

See also: *Early* v. *Doe*, 57 U. S. 617-618.

F.

The Case of Sola v. Registrar.

Under these circumstances, in March 1905, the Supreme Court of Porto Rico disposed of the case of *Sola* v. *Registrar* (8 P. R. R. 205), establishing the following doctrine:

> "It is a general principle in questions of jurisdiction that a court has cognizance of the suits to which the maintenance of all kinds of actions may give rise when the parties have submitted themselves, either expressly or impliedly, to its jurisdiction, providing that it has jurisdiction in matters of the same nature and in the same instance. This is a principle sanctioned by sections 76 and 77 of the New Code of Civil Procedure."

The facts which gave rise to the said action took place about the month of August, 1904, that is, immediately after the enactment of the new Code of Civil Procedure taken from the Codes of Idaho and California, thus embodying American principles beginning with the chapter relating to the organization of courts and their jurisdiction up to the taking of appeals.

It will suffice to glance at the said judgment, drawn up in its old form, to reach the conclusion that when such judgment was rendered the jurisprudence of Porto Rico was yet in an embryonic state. And with due deference to the honorable P. R. Supreme Court we respectfully submit that such judgment is erroneous and mistaken and was not based upon any precept of the old or modern law. For that reason it was promptly reversed. (*Esteras* v. *Arroyo*, 16 P. R. R. 689; *Nazario* v. *Registrar*, 16 P. R. R. 635.)

G.

The case of Garzot v. Rubio, construed by the P. R. Supreme Court.

In this condition of affairs, *on April* 6, 1908, the Supreme Court of the United States decided the case of *Garzot* v. *Rubio*, 209 U. S. 303, 28 Sup. Ct. 548, 52 L. ed. 794.

It appears that a suit was brought in the U. S. Court for the District of Porto Rico against Garzot seeking, among other things, the delivery of certain hereditary property and the division and partition thereof. The decedent always lived in the District of Humacao, where he died, and the property was situated in that district. No doubt remains, then, that in declaring what court had jurisdiction of the case it was definitely decided what interpretation should be given to the old law of Civil Procedure. The said court expressed itself as follows (parenthesis and italics ours):

> "By the Porto Rico Code of Civil Procedure, art. 62, par. 5 (art. 63), power to administer estates, both testamentary and intestate, is vested in the judge of the last place of residence of the deceased. THAT THE POWER THUS CONFERRED IS EXCLUSIVE IS SHOWN BY THE TEXT OF THE SAME ARTICLE and by the comprehensive grant of authority embraced in the provisions of the Code which follows, relating to the settlement of both testamentary and intestate successions."

It cannot be contended that this decision is *obiter dicta* so far as it relates to insular courts, since if this were so no citation of our Code of Civil Procedure should have been made. It would have sufficed to refer to the Act of Congress creating the Federal Court. The main object of said case was precisely to determine what court in Porto Rico had jurisdiction to dispose of cases of settlement of decedents' estates, both testamentary and intestate.

And the Supreme Court of the United States in disposing of the case and deciding that the Federal Court had no power to take cognizance of the matter, had to decide what court was vested with such jurisdiction, and this it did, holding that such jurisdiction "IS VESTED IN THE JUDGE OF THE LAST PLACE OF RESIDENCE OF THE DECEASED, SAID POWER BEING EXCLUSIVE." These are the facts and such is the interpretation invariably given to said case in this island. (*Esteras* v. *Arroyo*, 16 P. R. R. 689; *Martorell* v. *Ochoa*, 23 P. R. R. 28; *Nazario* v. *Registrar*, 16 P. R. R. 635).

If any idea existed that under the old Law of Civil Procedure a person, in an *ex parte* proceeding, could elect the court most convenient to him, such idea disappeared from the day the said Code was construed in the case of *Garzot* v. *Rubio, supra.* If prior to that day any doubt had existed, it was effectually dispelled and the rule of procedure to be followed in Porto Rico was established for all times, and the decisions in the cases of *Esteras* v. *Arroyo*, 16 P. R. R. 689 and *Nazario* v. *Registrar*, 16 P. R. R. 635, served firmly to establish in our jurisprudence the true concept and meaning of the term "jurisdiction". This principle has just been reaffirmed by the P. R. Supreme Court itself in the case of *Baerga* v. *Registrar*, decided May 20, 1921, 29 P. R. R. 440-442. We shall refer to this case later.

The foregoing is a detailed history of Portorican legislation regarding the matter in dispute and the jurisprudence in relation thereto.

There was no rule of property or of stare decisis in this case.

This case should have been decided by the P. R. Supreme Court in keeping with the opinion delivered in the case of *Martorell* v. *Ochoa*, 23 P. R. R. 28, but as that case was later reversed, although by a divided court, the case at bar was decided against the plaintiffs,—in said Supreme Court, in accordance with such reversal.

The P. R. Supreme Court based its opinion on the fact that

> "The Supreme Court of Spain and the General Directorate of Registries have established the general rule that in matters *ex parte* the law gives jurisdiction to the Court to which application is made; and as the authorization to convey property belonging to minors is an *ex parte* proceeding, the said doctrine is applicable to such authorization" (R. p. 153).

The attorneys for petitioners contend that this is a typical case involving the doctrine of *stare decisis* because when the sale was effected, namely, in 1908, it was the settled jurisprudence of Spain and Porto Rico that the petitioner in an *ex parte* proceeding can elect the court most convenient to him. In support of such contention they submit the following authorities, which we divide into six different groups, to wit:

A. Decisions of the Supreme Court of Spain of July 22 and Sept. 30, 1875 (32 Jur. Civ. 424 and 491), Oct. 6, 1876 (34 Id. 677) and June 2, 1977 (37 Id. 107).

B. Decisions of the General Directorate of Registries of January 22, 1886; 3 Coleccion Oficial, 451; May 9, 1889, 4 Id. 327.

C. 1 Manresa's Commentaries of the Law of Civil Procedure.

D. 2 Manresa's Commentaries on the Civil Code.

E. 3 Scaevola's Commentaries on the Civil Code, p. 311.

F. *Sola* v. *Registrar* (March 25, 1905, 8 P. R. R. 205; *Santos* v. *Registrar* (Nov. 13, 1908), 14 P. R. R. 741.

In the light of the authorities hereinbefore cited we will now consider the doctrine of "*STARE DECISIS*" and of alleged rule of property.

A simple glance at the citations made by the petitioners and a comparison between them and that part of the decision of the P. R. Supreme Court which we have transcribed, will suffice to justify the conclusion that they substantially agree in their fundaments and may be considered together.

In the year 1855, when Porto Rico was under Spanish sovereignty, a Law of Civil Procedure was enacted, article 1208 thereof prescribing that in *ex parte* proceedings the petitioner had his choice of courts. This law was repealed and on April 1, 1881 a new Law of Civil Procedure was passed to apply to the Spanish Peninsula and made extensive to the island of Porto Rico on January 1, 1886, by virtue of Royal Decree dated September 25, 1885. In this new enactment the provisions of article 1208 of the former law were entirely eliminated. In the year 1898 Spanish sovereignty ceased in Porto Rico and in 1900 the Congress of the United States enacted the Organic Act, known as the Foraker Act, for the Island, the new Territory forming ever since an integral part of the United States, with a native legislature, organized in accordance with the principles of American law and with powers

practically the same as those of the legislatures of any State of the Union.

Finally, on July 1, 1904, the new Code of Civil Procedure, which is still in force, went into effect, being almost a literal copy of the Codes of Civil Procedure of California, Idaho, and several other States of the American Union, as can be observed by a simple comparison between the various codes, except that jury trials were not made a part of the regular civil procedure in Porto Rico.

Now, the jurisprudence set out under group (a), namely, the judgments of the Supreme Court of Spain of July 22 and September 30 of 1875 and October 6, 1876, undoubtedly sustains that in *ex parte* proceedings the petitioner may choose his court and that such court is competent to take cognizance of the matter. But these decisions were rendered under the Law of Civil Procedure of the year 1855, according to which (section 1208) such line of procedure was authorized, which was not the case under the law of Civil Procedure that substituted such enactment. And under the sway of this latter law no like decision has ever been rendered by the Supreme Court of Spain and we challenge petitioners to cite a single case that has occurred in Spain under the law of 1881 which upholds such doctrine.

Consequently the decisions above referred to are without purpose and have no weight either as jurisprudence or otherwise.

The decisions of the General Directorate of Registries cited under group (b) are neither de-

cisions of the Supreme Court of Spain nor of the Supreme Court of Porto Rico and have no force as jurisprudence, inasmuch as the General Directorate of Registries of Spain is not a regular tribunal but simply a Board whose decisions are not binding upon courts of justice, since they are rendered in administrative appeals against the decisions of Registrars of Property.

> "Decisions rendered in administrative appeals from decisions of registrars of property are not binding upon the courts" (*Martorell* v. *Ochoa*, 23 P. R. R. 28, at p. 29).

Hence, such decisions cannot be considered for purposes connected with the doctrine of *STARE DECISIS* or of rule of property.

Nor can the citations appearing under groups (c) and (d), namely, Manresa's Commentaries, be held to apply. Such a work can be considered by a court to illustrate a certain point but is not binding upon it, and a judge may or may not follow its indications, which again do not form a basis for reaching a conclusion in regard to the rule of *STARE DECISIS*. Moreover, in referring to the former law of Civil Procedure in connection with the sale of minors' property, the commentator relied on by the adverse party expresses himself in the work cited, as follows:

> "As regards our Code there can be no doubt that for the alienation or encumbrance of real estate the authorization of the court is indispensable. The code requires that such authorization should be obtained from the judge of the domicile but as jurisdiction is a matter falling under the adjective law

> and the final provisions of the code only repealed the common civil law, we think that paragraph 23 of article 63 of the Law of Civil Procedure, which provides that authorization for the sale of property of minors or incapacitated persons shall be given by the judge of the place where the property may be situated, or of the domicile of the persons to whom it belongs, continues in force and is complementary to this article. HOWEVER, TO AVOID ANY QUESTION IT WILL BE MOST PRUDENT TO APPLY TO THE JUDGE OF THE DOMICILE." 2 Manrea's Commentaries on the Civ. Code, pp. 44-45, Third Edition.

As is seen, far from expressing a firm conviction of his ideas the author states that "TO AVOID ANY QUESTION IT WILL BE MOST PRUDENT TO APPLY TO THE JUDGE OF THE DOMICILE."

The citation made under group (c) fares no better than the preceding group, since, inasmuch as it refers to the opinion of a commentator, it cannot be considered for the purpose of establishing the doctrine of *STARE DECISIS*. But even if it could, a mere perusal of the following would suffice to show that his opinion does not favor the adverse party, even bearing in mind that the law construed in relation to the Civil Code was the former Law of Civil Procedure.

> "According to said article 164 of the Spanish Civil Code, the authorization must be obtained from the judge of the domicil, and while it does not state whose domicil, such domicil is understood as being that of the parents, since it is acknowledged that,

according to art. 64 of the Law of Civil Procedure, the domicile of the children subject to Patria Potestas is the domicil of their parents. This same statute, by subdivision 23 of article 63 establishes as a judge of competent jurisdiction the judge of the domicil of the children and also the judge of the district where the property is situated, a wise and practical alternative provision since it is natural to suppose that there are more purchasers at the place where the value and the utility of the property are known than where such details are ignored. Shall this double jurisdiction continue in force? Although for the reasons stated later we are of the opinion that the Code did not and could not repeal the Law of Civil Procedure, the provisions of the Code in regard to this matter are conclusive, since it prescribes that the authorization SHALL BE SECURED FROM THE JUDGE OF THE DOMICIL." 3 *Scaevola's Commentaries on the Civil Code*, 309-310.

Finally, although the judgments of the Supreme Court of Porto Rico described under group (f), namely, *Sola* v. *Registrar*, 8 P. R. R. 205 and *Santos* v. *Registrar*, 14 P. R. R. 741, in general terms hold that in *ex parte* proceedings the petitioner may submit to the jurisdiction of a certain court, it is also a fact that the second of said judgments was rendered in the month of November, 1908, or subsequent to the issuance of the court's authorization and the sale giving rise to the present suit. Therefore, it cannot be considered as having any bearing upon the doctrine of *STARE DECISIS*. The

other case of *Sola* v. *Registrar*, has been discussed by us hereinbefore.

Now, in considering the case of *Garzot* v. *Rubio*, 209 U. S. 303, decided on April 6, 1908, the doctrine upheld in the judgments referred to was discarded and substituted by that established in *Esteras* v. *Arroyo*, 16 P. R. R. 689. Since then the theory of submission in *ex parte* proceeding has been utterly abandoned in the case of *Baerga* v. *Registrar*, 29 P. R. R. 440, recently decided by the Supreme Court of the Island, wherein said court refused to be concluded by the said judgments under consideration.

The lower court in disposing of said case held that, inasmuch as there was a special Act—the Mortgage Law—governing the matter and indicating the court that shall take cognizance of the matter, the general doctrine of submission must be rejected. And precisely in this case said court seeks to trace a difference between the point there at issue and the case of *Ajenjo* v. *Rosa*, 26 P. R. R. 648.

It will suffice to read the case in question to arrive at the conclusion that now, more than ever before, there are reasons for believing that the error committed by the Supreme Court of Porto Rico in the case now pending on certiorari is of such magnitude that it was justly corrected by the Circuit Court of Appeals for the First Circuit. The reason is very simple. If the Supreme Court of Porto Rico decided in the present case that in *ex parte* proceedings "THE LAW GIVES JURISDICTION TO THE

COURT TO WHICH APPLICATION IS MADE" there is no doubt that the decision just rendered in the case of *Bacrga* v. *Registrar, supra,* constitutes a rejection of such doctrine and a re-establishment of the original doctrine, which is the rational and logical one and which originated when the Supreme Court of the United States decided the case of *Garzot* v. *Rubio, supra.*

Now, all the foregoing turns upon questions of *ex parte* proceedings in general. Nothing definite had been decided either in Spain or in Porto Rico in regard to the special proceedings provided for by section 229 of the Portorican Civil Code in force in 1908, which was in force when the sale of the property of the minor respondents (plaintiffs) herein took place. Said section reads as follows:

> "The exercise of the Patria potestas does not authorize the father or mother to alienate or burden real property which in any manner belong to the child, and over which either of them have the administration, except after securing judicial authorization, which shall be accorded by the District Court of the Judicial District where said property is situated, upon proof being furnished as to the necessity or utility of such transfer or burden. The aforesaid judicial authorization shall not be required of the father or mother as the case may be, in order to receive the payment of an indebtedness due to the child, or to cancel any lien or mortgage securing the same."

In 1915 the Supreme Court of Porto Rico rendered a unanimous decision in the case of *Mar-*

torell v. *Ochoa* (23 P. R. R. 28). And in construing section 164 of the former Civil Code, similar to the aforesaid section No. 229, the said Court expressed itself as follows:

> "The plain language of article 164 of the Spanish Civil Code shows that the intention of the legislature in enacting that authorization of court should be necessary for alienating or encumbering the property of minors, was that such authorization should be granted by the judge of the domicil of the minor and not by any other judge, thus determining the authority which should complete the civil capacity of the father or the mother of the minor, which capacity can be completed only in the manner provided by said article."

Thus, it was here for the first time that the matter relative to the sale of minors' property in connection with the jurisdiction of the courts was construed. And it was conclusively held by the Supreme Court of Porto Rico that the only court having jurisdiction of the matter is the court mentioned in section 229 of the Civil Code. This theory was subsequently set aside in the same case (26 P. R. R. 689), which case was appealed to, and reversed by, the Circuit Court of Appeals, First Circuit (276 Fed. 99).

In the case of *Baerga* v. *Registrar*, 29 P. R. R. 440, the Supreme Court of Porto Rico, on May 20, 1921, said:

> "The doctrine laid down in the case of *Sola* v. *Registrar of Property*, *supra*, does not refer to a case similar to the present case, for that case involved the recording

of a declaration of heirship while in this case it is sought to record a dominion title judgment. As regards the recording of dominion tittle judgments, we held in the case of *Nazario* v. *Registrar, supra*, that exclusive jurisdiction is conferred by article 395 of the Mortgage Law upon the Court of First Instance (now the District Court) of the district in which the property is situated, or in which the greatest part of it is situated in case of a property situated in several districts.

"That doctrine was not affected, as alleged by the appellant, by the later decision of this court in the case of *Ajenjo et al* v. *Santiago Rosa et al, supra*, for in that case there was no question of jurisdiction of dominion title proceedings, but of jurisdiction to authorize the alienation of property of minors.

"As the Mortgage Law makes *special provision for jurisdiction in dominion title proceedings in article* 395, that article must be followed (italics ours) and not the provisions of the Code of Civil Procedure governing the matter of jurisdiction in *ordinary cases* (italics ours).

"The General Directorate of Registries of Spain, in its decision of June 11, 1908, fixing the jurisdiction of possessory title proceedings, which the Mortgage Law confers upon the Court of First Instance of the district (now the District Court) wherein the property is situated, and under certain circumstances upon the municipal court, *corroborates* (italics ours) the jurisprudence laid down in the case of *Nazario* v. *Registrar, supra*, and that doctrine is now ratified."

We see, then, that the lower court draws a distinction between *ex parte* proceedings in general and such matters as are governed by special statutes or provisions. And the sale of property belonging to minors is regulated by section 229 of the Civil Code and by the Special Legal Proceedings Act (Sec. 80), this act being of such a special nature that even its title denotes it. Moreover, if according to the judgment we are now considering the Mortgage Law has not been affected by the jurisdiction which the case of *Sola* v. *Registrar*, *supra*, involves, why should it be affected in the present case in so far as concerns the property of minors? The Mortgage Law, also contains a special chapter devoted to minors' real estate, article 205 reading as follows:

> "The father, or in a proper case, the mother, can not alienate the real property belonging to a child of which they enjoy the usufruct or administration, nor encumber it, except for established causes of utility or necessity, and with the authorization of the judge of the domicile, (now of the *situs*) granted after hearing the representative of the department of public prosecution."
>
> Sec. 6889, *Comp. of the Rev. Stats. and Codes of P. R.*

If the premises are the same, the conclusions must also be the same.

THE DOCTRINE OF *STARE DECISIS* IS *NOT APPLICABLE.*

In order to make the doctrine of *STARE DECISIS* applicable to this case the particular point under discussion would have had to be decided several times, thus determining a rule of property. Such is not the case. On May 27, 1908,—the date of the authorization of the court on which the present litigation is based,—no judgment either of the Supreme Court of Spain or of the Supreme Court of Porto Rico was of record holding that authorizations for the sale of property belonging to minors could be granted *BY ANY JUDGE OF THE ISLAND.* No such judgment was ever rendered either in Spain or in Porto Rico. It is manifest, therefore, that the doctrine of *STARE DECISIS* cannot properly be invoked because the essential requirement of precedent is lacking. (*Bragg* v. *Mayor*, 141 Fed. 118; *Cons. Rubber Co.* v. *Ferguson*, 183 Fed. 756.)

Of the two cases cited, namely, *Sola* v. *Registrar*, 8 P. R. R. 205 and *Santos* v. *Registrar*, 14 P. R. R. 741, we have already stated that the second was decided in November, 1908, or after the order of the court authorizing the sale in question had been made. Both cases are alike, the second being a consequence of the first. The theory of both could not be more mistaken and erroneous. And we are compelled to reiterate that, for this reason, the doctrine involved therein was at once rejected. *Esteras* v. *Arroyo*, 16 P. R. R. 689; *Nazario* v. *Registrar*, 16 P. R.

R. 365; *Martorell* v. *Ochoa*, 23 P. R. R. 28. Such a case cannot serve as a basis for the rule of *stare decisis*.

Hertz v. *Woodman*, 218 U. S. 205;
U. S. v. *Southern Pacific Co.*, 230 Fed. 270;
Menge v. *The Madrid*, 40 Fed. 677.

Finally, we will cite from an old case which has been generally recognized by the courts as a true expression of a sound doctrine. We refer to the case of *McDowell* v. *Oyer*, 21 Pa. 417-423 in which the learned judge expressed himself as follows:

> "Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. A palpable mistake, violating justice, reason and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention that they demand reconsideration. There are some which must be disregarded because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion."

If nobody in Porto Rico regards said cases as precedents, the P. R. Supreme Court itself having discarded them, how can the opposing party seek to have this court sustain them in connection with the doctrine of *STARE DE-*

CISIS? (*Black, Law of Judicial Precedents*, p. 206.) Moreover, what has been decided in said cases does not cover the point at issue and even if it did, which we deny, the doctrine therein involved is so erroneous that it cannot serve as a basis for the rule of *STARE DECISIS.*

> "It is the decision of the case of the Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced, that if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day." *Genesse* v. *Fitzhugh*, 53 U. S. 455, 12 How, 455.

See also

Kilbourn v. *Thompson*, 103 U. S. 377.

The question in controversy is not a local one in matters of interpretation, and was properly reviewed and corrected by the Circuit Court of Appeals.

It is contended by petitioners that this case is based solely upon the construction given to Spanish decisions, and that, therefore, the judg-

ment of the P. R. Supreme Court should not have been reversed unless it was shown to be erroneous, citing various cases in support of such contention. This position is ill-founded and the cases cited are not applicable, if for no other reason, because the decisions of the P. R. Supreme Court was, as has been shown hereinbefore, manifestly erroneous.

A mere perusal of said cases is sufficient to show that they are not applicable to the case at bar, since here there is no dispute as to the facts in controversy and no local question is involved based on a disputed fact but precisely on what may perhaps be considered the most vital question that could be presented, involving as it does the sale of the property of minors who, though controlled directly by guardians, are nevertheless subject to the supreme tutorship which is exercised by the State through the two high branches of the government, the legislature and the courts of justice.

If, as alleged by petitioners, the Circuit Court of Appeals could not review a point of law of such magnitude as is involved herein, then it could never review an appeal from the P. R. Supreme Court, which is palpably absurd as is evident on its face. In point of fact, the Civil Code of Porto Rico already has been construed by the Circuit Court of Appeals in matters of unlawful detainer and there is no good ground for the hypothesis that its power so to do should be restricted in matters involving minors' property. *Central Vannina* v. *Lopez*, 259 Fed. 198.

The question in controversy was not decided in Porto Rico until the year 1915. And it was then held that the only court that could authorize the sale was the one designated in the Civil Code. *Martorell* v. *Ochoa*, 23 P. R. R. 28. This judgment was later reversed by a divided Court (*Martorell* v. *Ochoa*, 25 P. R. R. 707), two of its members dissenting. The majority opinion held that any court was empowered to authorize the sale, the letter and the spirit of the Civil Code notwithstanding. This later judgment was subsequently reversed by the Circuit Court of Appeals (*Martorell* v. *Ochoa*, 276 Fed. 99).

Minors cannot give consent. Nor can a guardian consent in their name. The State alone can cure the defect as to capacity and does so through the agency of an entity—the District Court. What District Court? The answer will be found in Section 229 of the Civil Code, as amended in 1907:

"*The district court of the judicial district where the property is situated.*"

This means that the lack of capacity on the part of the guardian is supplied by the consent of the court designated or appointed by the sovereign, the State, which designation is somewhat in the nature of an assignment of power, a power of attorney enabling the guardian to accomplish the act. This being the case the conclusion is inevitable that the court designated by statute *and no other* shall be the court competent to grant the authorization.

The legislature undoubtedly had in mind the fact that no court other than that where the property of the minor might be situated could better investigate and ascertain what was most suitable to the welfare and interests of the minor. For this reason it has clearly and distinctly designated the court charged with the duty of authorizing the sale. In the absence of such authorization on the part of the court the proceedings are necessarily null and void. In this connection, a principle of substantive law being involved, no general case can be applied by analogy unless it be one in which this question has been conclusively disposed of.

The rules in Louisiana and in Illinois also accord with the decision of the Circuit Court of Appeals herein.

The Civil Code of Porto Rico is very similar to the Louisiana Code, both having a common origin. *Garzot* v. *Rubio*, 209 U. S. 303. Besides, the former Law of Civil Procedure in Porto Rico was similar to that of Louisiana. We refer in this connection to the following citation from a case in said State where a matter somewhat similar to the one here on certiorari was discussed:

> "An act of the legislature, 3 Martin's Dig. 132, 17 requires the assent of the judge of the parish where the minor resides, to make an alienation of his property valid.
>
> "The evidence here shows that the parties were not residents of New Orleans; the

father, a few days before the sale of the property, it is true made a declaration in this city that it was his intention to take up his permanent residence here, but the law requires more, a declaration before the judge of the parish from which the party removes as well as that where he intends to reside.

"Considering, therefore, that the proper domicil of the minor was in the parish of East Rogue, I am of the opinion that the whole of the proceedings before the court of probate were *coram non judice* and of course void." *Leonard's Tutor* v. *Mandeville*, 3 La. Rep. 486; 9 Mart. (O. S.) 489.

See also:

Fletcher v. *Cunelior*, 4 La. 279;
Hawkins v. *Livington*, 10 Martin, 440;
Foley v. *Moorehouse*, 13 La. Am. 301.

In the State of Illinois there is Statute reading as follows:

"On the petition of the guardian, the county court of the county where the ward resides, or if the ward does not reside in the state, of the county where the real estate, or some part of it is situated, may order the sale of the real estate of the ward, for his support and education, when the court shall deem it necessary, or to invest the proceeds in other real estate or for the purpose of otherwise investing the same." *Revised Statutes of Illinois*, 1899, chapter 64, Section, p. 944.

This section is substantially similar to section 229 of the Civil Code of Porto Rico, both prior to and after its amendment in 1907.

In the case of *Spellman v. Dowse*, 79 Ill. 66, the Supreme Court of that State said:

> "The requirement of the statute that an application by a guardian to sell the real estate of his ward shall be made in the county where the ward resides, or, in case the ward does not reside in the state, in some county where the whole or a part of the real estate is situated, *is jurisdictional* and any material deviation from these requirements, as to the court in which the proceedings must be had, is *fatal to the jurisdiction of the Court.* (Italics ours.)

The above quoted decision speaks for itself and needs no furthr comment.

> "Because of their tender years and lack of experience, minors are favorites of the law. It is not uncommon to find exceptions in the law particularly favorable to them. For the reasons stated, to permit a probate court other than that of the county of the minor's domicile to take jurisdiction of his person and estate would be legislation discriminating against him."
>
> *Cornell* v. *Moore*, 70 Kan. 88, 78 Pac. 411-412.

> "By 'a district court of competent jurisdiction' mentioned in Comp. St. c. 23, par. 64, subd. 1, relating to sales by guardians of real property of the ward, is meant the district court of the county in which the guardian was appointed."

Puberman v. *Evans*, 46 Neb. 784 65 N. W. 1045.

See also

Loid v. *Malone*, 23 Ill. 43, 74 Am. Dec. 183

Section 229 of the Civil Code of this Island, as amended in 1907, requires the authorization of the Court of the District where the property is situated before the sale of property belonging to minors can be considered valid. This is a jurisdictional provision since it prescribes in a conclusive manner the only court having jurisdiction to decide the matter. And in holding the contrary, the P. R. Supreme Court clearly erred and its error was properly corrected on appeal, for the benefit of children in Porto Rico, by the Circuit Court of Appeals for the First Circuit.

For the foregoing reasons, respondents respectfully submit that the Uited States Circuit Court of Appeals for the First Circuit committed no error whatsoever, in reversing the decision of the Supreme Court of Porto Rico herein, and, therefore, the said respondents pray that the action, decision and judgment of the said Circuit Court of Appeals, First Circuit, may be affirmed in all respects.

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DIAZ, IN HIS OWN RIGHT, ETC., ET AL. *v.* CARLOTA AND CLEMENTINA GONZALEZ Y LUGO, ETC., ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 263. Argued January 24, 1923.—Decided February 19, 1923.

1. Power to authorize a parent to sell the interest of a minor child in land in Porto Rico, is not limited by the Porto Rican Civil Code, § 229 as amended in 1907, to the District Court of the Judicial District in which the property is situated, but may be exercised, under §§ 76 and 77 of the Code of Civ. Proc. 1904, by the court of another District to which the *ex parte* application is submitted. P. 103.
2. An interpretation of law which has become a rule of property, accepted by the practise of a community, should not be disturbed unless certainly wrong. P. 105.
3. Peculiar deference is due from this Court to the views of local matters taken by courts which, like the courts of Porto Rico, have inherited and been brought up in a different system of law to that which prevails here. P. 105.

276 Fed. 108, reversed.

CERTIORARI to a judgment of the Circuit Court of Appeals reversing one by the Supreme Court of Porto Rico in favor of the present respondents in their suit to set aside a sale of land.

Mr. Cornelius C. Webster, with whom *Mr. Jose R. F. Savage* was on the brief, for petitioners.

Mr. Jose A. Poventud, with whom *Mr. Frederick S. Tyler* and *Mr. Frank Antonsanti* were on the brief, for respondents.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the respondents to establish the nullity of a sale of their land while they were all minors. The Supreme Court of Porto Rico upheld the sale and ordered the complaint to be dismissed, 27 P. R. 364; but the judgment was reversed by the Circuit Court of Appeals, 276 Fed. 108, following another decision made by it at the same term. *Agenjo* v. *Agenjo*, 276 Fed. 105. Thereupon a writ of certiorari was granted by this Court.

The father of the respondents (plaintiffs) died in 1904, owning the land in question, and the title passed to his widow and his children, the plaintiffs. The land is in the judicial district of Humacao. In 1908 the widow obtained authority to make the sale from the District Court of the judicial district of San Juan and the sale was made. This suit proceeds on the ground that only the Court of the judicial district where the land was situated had power to authorize the sale of the minors' interest in the land.

The argument that prevailed with the Circuit Court of Appeals is forcible and perhaps might prevail with us if we looked at the face of the statutes invoked, without more. By § 229 of the Civil Code of Porto Rico, as amended by an Act of March 14, 1907, Laws of 1907,

p. 284, "The exercise of the *patria potestas* does not authorize the father or mother to alienate or burden real property which in any manner belongs to the child, and over which either of them have the administration, except after securing judicial authorization, which shall be accorded by the District Court of the Judicial District where said property is situated, upon proof being furnished as to the necessity or utility of such transfer or burden." This naturally enough is taken to mean that the Court of that district alone can give the authority required. The interpretation gains further force when it is known that this section of the Civil Code of 1902 originally gave the power to the District Court of the minors' domicile and that it was amended to its present form in 1907, with a provision, in case of a sale by auction, for a publication in a newspaper having a circulation in the district. It certainly is not unnatural to read the quoted section as excluding the application of the more general §§ 76 and 77 of the Code of Civil Procedure, 1904, by which, (76,) "In accordance with its jurisdiction, a court shall have cognizance of the suits to which the maintenance of all kinds of actions may give rise, when the parties have agreed to submit the suit to decision of court." (77) "The submission shall be understood to be made: 1. By the written agreement of the parties. 2. By the plaintiff through the mere act of applying to the court and filing the complaint. 3. By the defendant when, after his appearance in court, he takes any step other than to request that the trial be held in the proper court."

One might doubt even whether the last cited sections apply to any *ex parte* proceedings. The respondents made the most of the doubt. But those sections embody earlier law and practise and we accept the conclusion of the Supreme Court that they have been taken to extend to such cases. *Martorell* v. *Ochoa*, 26 P. R. 625. *Agenjo* v. *Santiago Rosa*, 26 P. R. 648. The most forcible objec-

tion is that which we have stated; that a special law definitely applicable limits general expressions in other laws that otherwise might be sufficient. We will not repeat the argument quoted from Manresa and Scaevola that jurisdiction is a matter of adjective law and that the general provisions with regard to it are not repealed by a repeal of the substantive law or change in the Civil Code. 26 P. R. 631, 632. We will do no more than note Manresa's conclusion that although it would be more prudent to apply to the Judge specially designated, any Judge having jurisdiction of this class of cases is made competent by the submission implied from invoking his action. The distinction taken seems to be similar to that which we take between jurisdiction and venue. *Martorell* v. *Ochoa,* 25 P. R. 707, 729. A mistake as to the latter is waived by submission, *Lee* v. *Chesapeake & Ohio Ry. Co.,* 260 U. S. 653, and in the Porto Rican law an *ex parte* application is an adequate submission. This is a perfectly intelligible view, and when we are assured by the Supreme Court that it long has been taken, 25 P. R. 729; 26 P. R. 634; interrupted only by a momentary obstruction caused perhaps by accepting too broadly and absolutely an expression in *Garzot* v. *De Rubio,* 209 U. S. 283, 303, we see no reason for not taking it here. The fact alleged that this interpretation of the law has become a rule of property, 25 P. R. 730, is very important and is not weakened by there being only a small number of decisions on the point. If it has been accepted by the practise of the community it should not be disturbed except upon an unescapable conclusion that it is wrong.

This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite *De Villanueva* v. *Villanueva,* 239 U. S. 293, 299. *Nadal* v. *May,* 233 U. S. 447, 454. This is especially true in dealing with the decisions of a Court inheriting and brought up in a differ-

ent system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books. In this case a slight difference in the caution felt in dealing with the interest of minors (*Baerga* v. *Registrar of Humacao*, 29 P. R. 440, 442,) and a slight change of emphasis in the reading of statutes, explain the divergence between the Supreme Court and the Circuit Court of Appeals. Our appellate jurisdiction is not given for the purpose of remodelling the Spanish American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below.

Judgment of Circuit Court of Appeals reversed. Judgment of Supreme Court of Porto Rico affirmed.